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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 929

HUGH BRYSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
[illegible] Montgomery Street, San Francisco 4, California,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 30, 1959.

CITATION TO OPINIONS BELOW.

The opinions of the District Court dealing with pre-trial proceedings are reported at 16 F.R.D. 431,

450, 453, and 477. The opinion of the Court of Appeal granting bail pending appeal is reported at 223 F.2d 775. The opinions of the Court of Appeals affirming the conviction and denying a rehearing are reported at 238 F.2d 657 and 243 F.2d 837. All of the foregoing opinions are printed in the appendix to the petition for certiorari in *Bryson v. United States*, No. 1065, O.T. 1956 (renumbered, No. 171, O.T. 1957), to which the Court is respectfully referred. This Court denied certiorari, 355 U.S. 817.

The opinion of the District Court denying petitioner's motion for modification of his sentence, the opinion of the Court of Appeals denying the Government's motion to dismiss the appeal therefrom and granting petitioner's motion to include in the record on appeal a copy of the Probation Officer's report, and the opinion of the Court of Appeals on rehearing again denying the Government's motion to dismiss the appeal but reversing itself on the question of the inclusion of the Probation Officer's report in the record on appeal are all unreported. The opinion of the Court of Appeals dismissing the appeal from the order denying modification of his sentence was rendered on March 30, 1959, and is as yet unreported. All of the opinions referred to in this paragraph, being the opinions to be reviewed by the writ here sought, are printed in the appendix to this petition.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 30, 1959. On April 17, 1959, Mr. Justice Douglas entered an order extending until May 22, 1959, the time within which this petition might be filed. The jurisdiction of this Court is invoked under 28 USCA 1254(1).

QUESTIONS PRESENTED.

The Court of Appeals for the Ninth Circuit dismissed an appeal from an order of the District Court for the Northern District of California denying a motion, made pursuant to Rule 35, F.R.Crim.Pro., for an order reducing or modifying his sentence.

The questions presented are:

1. Whether the imposition of the statutory maximum penalty may not, under some circumstances, constitute cruel and unusual punishment within the meaning of the Eighth Amendment. *Weems v. United States,* 217 U.S. 349; *Trop v. Dulles,* 356 U.S. 86; Cf. *O'Neil v. Vermont,* 144 U.S. 323; *McDonald v. Commonwealth,* 173 Mass. 322.

2. Whether in this case the imposition of the statutory maximum penalty did not in fact constitute cruel and unusual punishment.

3. Whether a defendant is entitled to due process of law in connection with post-conviction proceedings, including the determination of motions under Rule [illegible] *Williams v. New York,* 337 U.S. 241; *Townsend v. Burke,* 334 U.S. 736; *Vetterli v. United States,* 344

U.S. 872; *Calvaresi v. United States,* 348 U.S. 961; *Yates v. United States,* 356 U.S. 363.

4. Whether the trial Court applied unlawful and improper standards in denying petitioner's motion to reduce or modify the sentence, and whether the trial Court's action was not so arbitrary and capricious as to amount to a denial of due process of law. *United States v. Daugherty,* 269 U.S. 360.

5. Whether a Probation Officer's report which was considered by the trial judge in connection with a motion under Rule 35 may be excluded from the record of the proceedings in the District Court and on appeal.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

The Eighth Amendment to the Constitution of the United States reads as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Rule 35, Federal Rules of Criminal Procedure, reads as follows:

> "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

STATEMENT OF THE CASE.

Petitioner was charged in a three-count indictment with having violated 18 USCA 1001 by having falsely sworn in 1951 that (1) he was not a *member* of the Communist Party; (2) he was not *affiliated* with that party; and (3) he did not *support an organization which advocated violent overthrow of government.* Prior to trial the Government voluntarily dismissed the third count. A jury acquitted petitioner of the first count, thereby finding that he had not been a member of the Communist Party in 1951. It convicted him on the second count, thereby finding that in 1951 he had been affiliated with that party.

The trial Court, William C. Mathes, J., analogizing the offense to a violation of the Smith Act imposed the maximum sentence—a $10,000 fine and imprisonment for a period of five years.[1] Upon appeal, the conviction was affirmed (238 F.2d 657) and certiorari was denied (355 U.S. 817).

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[1]The same trial judge presided in the Los Angeles Smith Act cases. *Yates v. United States,* 354 U.S. 298. This judge's position, *vis-a-vis* alleged Smith Act violators is clearly spelled out by his persistent refusal to grant reasonable bail, *Stack v. Boyle,* 192 F.2d 56; *Stack v. Boyle,* 342 U.S. 1; *United States v. Schneiderman, et al.,* 102 F.Supp. 52; *United States v. Spector,* 102 F.Supp. 75; *Stack v. United States,* 192 F.2d 875; *Spector v. United States,* 193 F.2d 1002, and by his repeated orders for the incarceration of Mrs. Yates, *Yates v. United States,* 356 U.S. 363.

Interestingly enough, in a recent case involving a false statement prosecution under 18 USCA 1001 which concerned employment in a plant operating under the Atomic Energy Commission, Judge Mathes imposed a *three-year sentence. Pitts v. United States,* 263 F.2d 353 (9 Cir.). Perhaps the distinction is that the false statement did not relate to Communism but only to previous felony convictions.

When the mandate was filed in the District Court, petitioner moved for a stay so that he might prepare a motion for relief under Rule 35. The stay was granted by Judge George B. Harris, then sitting in the Master Calendar Department. Furthermore, Judge Harris directed the Probation Officer to prepare a supplemental probation report (TR 3-4). The motion (TR 4) was made, supported by an affidavit of petitioner (TR 5-22). Prior to the hearing on the motion, and at the suggestion of the Probation Officer, petitioner had procured from many citizens in the community, letters attesting to his good character.[2]

The motion was heard by Judge Mathes. At the opening of the Court session a probation report was submitted to the Court and to all counsel. In that report the Probation Officer stated:

> "Your Probation Officer in his investigation has been unable to uncover any recent indication of affiliation or association with communist activities and your Honor's attention is invited to the sworn statement of Hugh Bryson which is attached hereto, in which he denies any recent activities of this type."[3]

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[2]Letters of similar import had been submitted to the Probation Officer at the time sentence was originally passed. A panel of the Court below commented as follows, with respect to this matter, at a time when the application for bail pending appeal was before it:

". . . there are of record in the files of this action statements of a large number of responsible citizens of California to the effect that Bryson was a reliable and dependable person . . ." (223 F.2d at 777).

[3]A copy of this report is appended hereto for the convenience of this Court.

At the outset of the argument Judge Mathes said that he had considered the motion papers, the petitioner's affidavit, and the many letters received. Presumably the judge had also considered, although he did not so state, the Probation Officer's report. On the argument the Government adopted a neutral position on the motion.

At the conclusion of the proceedings, Judge Mathes denied the motion, stating:

> "These are very difficult matters, a difficult one especially because of the type of person involved. The autobiographical affidavit that the defendant filed explains in rather eloquent case history terms the monstrous economic conditions that existed during the depression years in this country which drove many fine young people into the Communist Party. I presided at a trial of fourteen Communists down in Los Angeles, and at the time of sentence heard each one of them tell his life history somewhat in the same vein as the defendant, Bryson, and it was surprising how many of those confessed to Communism, those who were born in this country, how many of them went into the Communist Party and embraced the philosophy during dismal years of 1931, say, to 1934. There used to be an expression I heard years ago. We used to hear it quite frequently. I do not know the source of it, but something to the effect that if a college-trained man at 20 was not a Socialist or not inclined to be a Socialist, something was probably wrong with his heart. If at 40 he was still inclined to be a Socialist, something was probably wrong with his head.

> "I wish I could believe Mr. Bryson is no longer a Communist. I wish I could believe he was dedicated as he apparently once was to Communism—I wish I could believe he were dedicated today to defend our system which I am sworn to uphold. I find nowhere in his affidavit any renunciation or denunciation of Communism or Communist doctrine. In short, gentlemen, I can't bring myself to grant the motion. The motion will be denied and the defendant will be committed to the custody of the Marshal to serve the sentence. His bail will be exonerated." (Tr. January 3, 1958, pp. 16-17.)[4]

Petitioner was thereupon remanded to the custody of the Attorney General. Ever since January, 1958 he has been, and now is, confined at the United States Correctional Institution at Terminal Island, California. Petitioner, on January 10, 1958, filed a motion for reconsideration, supported by an affidavit which stated:

> "I tried to make it clear in my affidavit that I do not any longer hold the views I used to have when I went to Communist meetings many years ago. Stronger than any words I can say is the way I have changed—I mean my whole life and my thinking. Not being a lawyer I don't know how to say it any different than I did. I wrote that affidavit myself and it was the truth. I don't see there can be any question as to how I stand.

[4]The transcript of the proceedings of January 3, 1958, has been lodged with the Clerk of the Court of Appeals, but because it consists primarily of argument of counsel, it has not been included in the printed record. If the writ is granted here, petitioner will arrange to have the portion quoted above added to the printed record.

I am not in favor of communism; I am against it, I don't have the same beliefs any more that I used to have. My affidavit freely admits my past mistakes regarding communism. I have no interest any more in politics of any kind or in radical economic theories. My only interest is to support my family and live a good Christian life with them. You might call it the American way—that's how I feel about it. That's exactly what I've been doing now for years, even before my trial, in fact long before the indictment. I don't see how there can be any doubt. I appreciate my country and what it stands for and would [sic] it with my life in a second. I have no other interests or sympathies. What else can I say to show I have completely broken off forever with my past.

"I feel the Judge misunderstood my affidavit completely. If he had asked me any questions, I'm sure I could have cleared up any uncertainty.

"I write these words in prison for my attorneys to present to Judge Mathes for consideration.

"And I swear to God these words are the truth."

This motion was never ruled upon by the District Court.

Petitioner filed a timely appeal (TR 23), from the order denying his motion to reduce or modify the sentence. Petitioner designated the report of the Probation Officer as part of the record on appeal. The Clerk of the District Court advised that the report had not been filed and was not part of the record in the District Court and therefore could not be certified

to the Court of Appeals. Petitioner thereupon moved the District Court for an order directing that the report be filed and certified. This motion was denied without prejudice to its renewal in the Court of Appeals. Thereupon, petitioner moved the Court of Appeals for an order directing the District Court to cause the report to be filed and certified. The Government responded by a motion to dismiss the appeal, urging that the order denying the motion to modify was not appealable, or if it were, the appeal was frivolous. On April 22, 1958, the Court of Appeals (Healy, Pope and Hamley, JJ) denied the Government's motion to dismiss and directed that the report be made part of the record. However, on June 12, 1958, on rehearing, the Court of Appeals reversed itself on the last point and directed that the appeal proceed without the inclusion of the report. On March 30, 1959, the Court of Appeals (Chambers and Hamlin, Circuit Judges, and Solomon, District Judge), presumably without the benefit of the report, dismissed the appeal from the trial Court's denial of the motion to reduce the sentence under Rule 35.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred in holding that:

1. The imposition of a sentence within the limits fixed by the statute should not be disturbed on the claim that it was cruel or unusual.

2. The trial Court did not deprive petitioner of due process of law in denying the motion to reduce

the sentence; it did not apply unlawful and improper standards in ruling on the motion; and it was not arbitrary or capricious in its action; and that, in any case, the Court of Appeals could do nothing about it.

3. The Probation Officer's report should not be considered on the appeal.

REASONS FOR GRANTING THE WRIT.

This is the first case in this Court, so far as we know, in which the scope of authority of a District Court in a Rule 35 proceeding is at issue. After the affirmance of his conviction and within the time allowed by the rule, petitioner filed a motion for the reduction of his sentence (TR 4). This motion was supported by an affidavit which recited petitioner's earlier association with Communists, his break with them in 1947 (four years before the offending affidavit was filed), and the complete reformation of his mode of living in the last several years (TR 5-22). These statements were uncontroverted. Indeed they were supported, by many letters attesting to petitioner's good character, and by the results of the Probation Officer's investigation. The Government adopted a neutral position on the motion. Nonetheless, the trial Court, despite the mass of evidence, was unable to believe petitioner was no longer a Communist and refused to modify the sentence. The trial Court was assertedly so influenced because of its inability to believe that petitioner was "dedicated to defend our system which I am sworn to uphold", and because it

failed to find in petitioner's affidavit "any renunciation or denunciation of communism or communist doctrine". Petitioner's motion to reconsider, also filed within the time permitted by Rule 35 (TR 27-28), and supported by a further sworn statement (TR 28-29) in which he sought to dispel the trial Court's doubts, and in which he categorically stated "I am not in favor of communism; I am against it" (TR 28), was not even ruled upon by the trial Court.

In this petition we argue that the imposition of a statutory maximum penalty may, under some circumstances, constitute cruel and unusual punishment within the meaning of the Eighth Amendment, and that in this case it did so. We also urge that due process applies to the determination of a Rule 35 motion, and that on this record petitioner was denied due process at this stage of the proceedings. Furthermore we contend that the trial judge refused to bring to bear on the issue before him any exercise of judicial discretion, hence, that his action was arbitrary. Finally, we assert that it was error to exclude the Probation Officer's report from the consideration of the Court below.

I.

THE IMPOSITION OF THE STATUTORY MAXIMUM ON THIS RECORD CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT.

Petitioner had originally been charged in three counts with making false statements respecting (1)

his personal support of violent overthrow of government; (2) his membership in the Communist Party; and (3) his affiliation with that organization. The Government withdrew the first and most serious of these charges, and the jury acquitted petitioner of the second and next most serious. He therefore stood convicted of making a false statement with respect to *affiliation*—whatever that may mean.[5]

Petitioner contends that the imposition of the maximum statutory penalty for such a violation constitutes cruel and unusual punishment. The Court below held this argument could not prevail because the sentence was within the limits fixed by the statute. We believe this takes too narrow a view of the constitutional guarantee.

The constitutional term has not often been defined, but it clearly bars a punishment which is disproportionate to the offense. *Weems v. United States*, 217 U.S. 349, 368. In *Weems*, this Court quoted *McDonald v. Commonwealth*, 173 Mass. 322, to the effect that "punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment." *Weems*

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[5]Frankfurter, J., in *ACA v. Douds*, 339 U.S. 382, 420, n. 2 referred to it as a term of "dubious scope."

Other judges have had equal difficulty with the term:

Judge Learned Hand, in *Tolsky v. Wilson*, Southern District of New York, cited in *Bridges v. Wixon*, 154 F.2d 927, 941, n. 1, said: "As to affiliation the case is not so clear, and depends on how one defines that word."

Judge Chase, in *United States v. Reimer*, 79 F.2d 315, 317, said that definition of "affiliation" "is . . . impossible . . ."

Judge Major, in *Inland Steel v. National Labor Relations Board*, 170 F.2d 247, 262, said of "affiliation": "Its meaning would be quite beyond the reach of the ordinary citizen."

also referred to the statement of Mr. Justice Field in *O'Neil v. Vermont,* 144 U.S. 323, that the prohibition of the Eighth Amendment "was directed not only against punishment which inflicted torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportionate to the offense charged.'"

More recently in *Trop v. Dulles,* 356 U.S. 86, this Court said that the Eighth Amendment requires punishment to conform to "principles of civilized treatment" and to be imposed "within the limits of civilized standards." In determining whether these standards are met, the Court indicated that punishment would be considered in relation to "the enormity of the crime" (356 U.S. at 100).

The foregoing establishes that the Eighth Amendment requires that there be some reasonable relationship between punishment and crime. It is submitted that in this case, the punishment imposed far exceeded the seriousness of the offense.

Here, Congress fixed a maximum punishment of five years imprisonment and $10,000 fine for false swearing respecting a personal advocacy of violent overthrow of government, membership in a proscribed organization, and affiliation with that organization. The degrees and grades of severity of the three offenses make it clear that there is, or constitutionally ought to be, a degree and gradation of punishment. If the maximum punishment to be imposed for falsely swearing that one does not personally support the overthrow of government is five years in prison and

a $10,000 fine, then it is cruel and unusual to impose that same punishment on a person who is found not guilty of that offense, but is found guilty of the much less serious and somewhat ambiguous offense of falsely stating that he is not *affiliated* with a specified organization.

While the constitutional objections as to the vagueness of the term "affiliation" have been rejected in this case, the factors upon which they were based are hardly irrelevant in the assessment of an appropriate sentence.[6] Nor can the jury's own lack of clarity with respect to the meaning of the term be disregarded at the sentencing stage of the proceedings. And it is particularly important to recall that the man upon whom sentence was here imposed was acquitted of Communist Party membership—and a charge that he supported an organization advocating violent overthrow of government, was abandoned by the prosecution before trial.

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[6]This Court has frequently struck down judgments based on "affiliation" in the presence of a variety of extenuating considerations. Thus, in *Bridges v. Wixon*, 326 U.S. 135, deportation for "affiliation" with the Communist Party was held improper in the absence of proof that the alien adhered to *proscribed objectives* of the organization, as distinguished from mere cooperation with it in lawful activities (at 143-144). In *Rowoldt v. Perfetto*, 355 U.S. 115, deportation for "affiliation" was again held improper, for failure to prove a "meaningful association" not wholly devoid of "political implications". And in *Schware v. Board of Bar Examiners*, 353 U.S. 232, New Mexico's refusal to admit to the bar of that state a former Communist Party member, was disapproved with a reminder, "Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct." (at 246.)

To impose the maximum sentence as to both imprisonment and fine is, on this record, to impose a cruel and unusual punishment.

II.

PETITIONER WAS DEPRIVED OF THAT DUE PROCESS OF LAW TO WHICH HE WAS ENTITLED DURING THE COURSE OF THE POST-CONVICTION PROCEEDINGS BY THE APPLICATION TO HIS MOTION OF UNLAWFUL AND IMPROPER STANDARDS AND BY THE ARBITRARY AND CAPRICIOUS ACTION OF THE TRIAL JUDGE.

A. The trial Court applied improper standards in denying the motion to reduce or modify the sentence.

The trial judge imposed the maximum sentence upon petitioner because he did not believe that petitioner was "dedicated" to a "system" which the judge was sworn to uphold. The judge was re-enforced in his conclusion that the maximum sentence should be imposed because he did not find in petitioner's supporting affidavit a "renunciation or denunciation" of Communist doctrine.

It is submitted that such criteria are not proper in the determination of sentence and that a defendant is not to be visited with a harsher sentence than might otherwise be the case because of the trial judge's appraisal of his political views.

Furthermore, the trial judge was under a substantial misapprehension as to what the record shows. Petitioner's affidavit (TR 5-22) eloquently establishes the change which had taken place in his activities and thinking from the time he first stood before the Court

for sentencing.[7] The Court below acknowledged the importance of these statements but said that, although they were uncontradicted, the trial judge was not required to believe them. But a refusal to believe that which is not only uncontradicted, but, as here, is substantially corroborated, can only be characterized as arbitrary, capricious and, indeed, whimsical.

The foregoing demonstrates that the trial judge applied improper legal standards in the determination of sentence, and that he made certain assumptions which were contrary to and not supported by the record. Either of these errors requires a reversal of the judgment and a re-sentencing of appellant.

It is the law that when a trial Court fails to apply proper legal standards, the judgment, even though otherwise correct, must be reversed. *Takehara v. Dulles,* 205 F.2d 560 (9 Cir.); *Mar Gong v. Brownell,* 209 F.2d 448 (9 Cir.); *Wilson v. United States,* 250 F.2d 312 (9 Cir.).

In *Mar Gong,* a judgment was reversed because it was "based in part upon circumstances shown in . . . other cases" (209 F.2d at 450). Here it is obvious that Judge Mathes based his order in part at least upon circumstances shown in the Los Angeles Smith Act cases. In *Wilson v. United States, supra,* a judgment was reversed and the case re-

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[7]Because of the observation made by the trial judge, and in order to dispel any lingering doubts which might have remained in his mind, petitioner requested reconsideration (TR 27) and submitted a sworn statement in which he categorically said, "I am not in favor of Communism; I am against it" (TR 28). Yet the trial judge refused to act on this petition.

manded for reconsideration because, although the result reached was otherwise justifiable, the trial judge had acted upon an erroneous legal premise.

> "It is a fundamental precept of the administration of justice in federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way." (250 F.2d at 324.)[8]

It cannot seriously be contended that such a fundamental precept is to govern the trial alone and that it has no application to the determination of sentence. The reasons which impel the enforcement of such a rigid standard during the trial are equally applicable at the moment of sentence. It will not do to say that an accused must be fairly treated throughout the trial but may be arbitrarily and capriciously sentenced at its conclusion.[9]

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[8]Subsequently a new trial was ordered because the trial Court found it impossible to reconsider the evidence under the "required construction of the law". *Wilson v. United States*, 264 F.2d 74, 75 (9 Cir.).

[9]Mr. Justice Stewart, when sitting on the Court of Appeals, observed that the "surest measure" of justice to a convicted criminal is the "fairness of the sentence he receives". (*Shepard v. United States*, 257 F.2d 293, 294, 6 Cir.) In that case the following was also said:

> "It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him, should have so neglected this most important dimension of fundamental justice."

For the reasons set forth in this petition, we do not believe that the anomaly conceived of by Mr. Justice Stewart does indeed exist.

This fact has been recognized in the decisions of this Court. In *United States v. Daugherty,* 269 U.S. 360, the defendants were sentenced to three consecutive five-year terms after having been found guilty on each of three counts. The Court of Appeals was of the view that there had been but one offense and construed the sentence as being only for a single five-year period. On certiorari, this Court held that there were three offenses and that the sentence imposed was in fact for three consecutive five-year periods. If this Court were not concerned with the sentence, that would have ended the matter. The Court of Appeals would have been reversed and the original (legally correct) sentence of the District Court reinstated. However, despite its affirmance of the District Court's judgment, the Supreme Court sent the case back for resentencing, saying:

> "We deem it proper to add that the sentence of fifteen years imposed upon respondents *seems extremely harsh.* Circumstances not disclosed by the record may justify it, but only extraordinary ones could do so.
>
> "The judgment of the Court of Appeals is reversed and the one entered by the District Court affirmed. The cause will be remanded to the latter court for further proceedings in conformity with this opinion." (269 U.S., at 364.)

In any event, this Court, in the exercise of its supervisory powers over the inferior federal courts, has time and again remedied injustices in sentences, whether such injustices resulted from procedural deficiencies or from the imposition of excessive punishments.

In *Townsend v. Burke*, 334 U.S. 736, and again in *Keenan v. Burke*, 342 U.S. 881, this Court *reversed the sentences* even though it affirmed the judgments. The sentences were reversed because they had been entered by the trial judges on the basis of certain assumptions of fact about the defendant which were not true. In the case at bar Judge Mathes made certain assumptions about petitioner which were not true and were unsupported by the record. On the authority of the *Townsend* and *Keenan* cases, the sentence based upon those assumptions must be vacated.

In *Williams v. New York*, 337 U.S. 241, 252, n. 18, this Court, citing *Townsend*, specifically recognized that "the sentencing procedure is [not] immune from scrutiny under the due-process clause."

Vetterli v. United States, 344 U.S. 872, illuminates the point here under consideration. There, the defendant had been convicted of perjury following his testimony before a Grand Jury investigating espionage activities. The Court of Appeals (*Vetterli v. United States*, 198 F.2d 291 (9 Cir.)) rejected the contention that the *sentence* was invalid because it rested in part upon the defendant's failure to testify. The Court there said, in language almost identical with that which it here used:

> "Appellant challenges the validity of the sentence imposed because of certain remarks made by the trial court at the time of pronouncement. The sentence imposed was entirely within the limits fixed by law and thus was within the discretion

of the Court, and we are therefore in no position to disturb it." (198 F.2d at 294.)[10]

When *Vetterli* got to this Court, the following order was entered:

> "*Per Curiam:* The motion for leave to proceed in forma pauperis is granted and the petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for re-sentencing *without taking into consideration defendant's failure to testify.*" (344 U.S. 872.)

The lesson of *Vetterli* appears to be clear: When a sentencing judge takes into consideration matters which he ought not to, an Appellate Court not only may but should vacate the sentence and remand the case for re-sentencing which will be free of legal error.

Indeed, an Appellate Court has the power and perhaps even the duty of vacating and remanding the cause for re-sentencing before a different judge. In *Calvaresi v. United States,* 348 U.S. 961, the defendants had unsuccessfully sought to disqualify the trial

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[10]The Court relied upon *Kawakita v. United States,* 190 F.2d 506, affirmed 343 U.S. 717. But *Kawakita* does not hold that there are no circumstances in which a reviewing court may not examine into a sentence. What this Court said in *Kawakita* was this:

> "Whether *a sentence may be so severe and the offense so trivial that an appellate court should set it aside* is a question we need not reach. The flagrant and persistent acts of petitioner gave the trial judge such a leeway in reaching a decision on the sentence that we would not be warranted in interfering." (343 U.S. at 745.)

This at least leaves open the question here sought to be reviewed if indeed it does not suggest its answer.

judge. On appeal, they pointed to the excessive sentences imposed as proof of the bias asserted. Of this contention the Court of Appeals (*Calvaresi v. United States*, 216 F.2d 891 (10 Cir.)) said:

> "While the sentences imposed are very severe, they are in every instance within the legal maximum provided by the statute. It cannot be said that standing alone the imposition of a sentence which the court had lawful authority to impose was bias and prejudice." (216 F.2d, at 900.)

When *Calvaresi* reached this Court, the following order was entered.

> *"Per Curiam: In the interests of justice and in the exercise of the supervisory powers of this Court,* certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial *before a different judge."* (348 U.S. 961.)

In *Nilva v. United States*, 352 U.S. 385, the defendant had been found guilty of three specifications of contempt of Court. On certiorari this Court found only one of these specifications sustainable. This was enough to support the sentence. However, this Court said:

> "There remains a question as to the petitioner's general sentence. It was imposed following his conviction on each of the three original specifications. Although the government now undertakes to sustain but one of the convictions, it contends that that petitioner's sentence should be left as it is because it was within the trial court's allowable discretion. We believe, however, that the court should be given an opportunity to recon-

> sider petitioner's sentence in view of the fact that his conviction now rests solely upon the third specification." (352 U.S., at 396.)

To the same effect, see *Yasui v. United States,* 320 U.S. 115, 117; and *Hasty v. United States,* 282 U.S. 694, 703.

The latest expression of this Court's views is in *Yates v. United States,* 356 U.S. 363 where Judge Mathes had found the defendant guilty of eleven separate contempts. After a long series of intermediate proceedings (356 U.S. at 363-365), this Court held that the defendant had committed only one contempt (*Yates v. United States,* 355 U.S. 66) and remanded the case for re-sentencing. The fact of the remand is in itself significant, since, as the government argued, the one contempt was sufficient to sustain the sentence. But nevertheless the sentence was vacated and the case was remanded for re-sentencing "in the light of this opinion" (355 U.S. 76).

On remand, Judge Mathes adhered to his original sentence and he was affirmed in the Court of Appeals although that Court was of the view that the sentence was "severe" (*Yates v. United States,* 252 F.2d 568, 569 (9 Cir.)). The Court of Appeals said this was like every other case "where the defendant thinks he was sentenced too heavily and has no other claim on which to attack his sentence" (252 F.2d at 569). This Court did not consider the law to be so inflexible. It recognized that the proper place for the reduction of sentence was in the trial Court. However when that Court "appears not to have exercised its discretion

. . . but in effect to have sought merely to justify the original sentence, this Court has no alternative but to exercise its supervisory power . . . by setting aside the sentence of the District Court" (*Yates v. United States,* 356 U.S. at 366-367).

We submit that the record in this case demonstrates that the trial judge did not *exercise* his discretion here but, as in *Yates,* sought merely to justify his original sentence. The sentence therefore should be vacated, and the cause remanded for further proceedings.

B. The trial Court abused its discretion and acted in an arbitrary and capricious manner in refusing to revoke or modify the sentence.

Rule 35, Federal Rules of Criminal Procedure, provides that "the court may reduce a sentence" after an order denying certiorari. Obviously the purpose of the rule was to permit a trial judge to re-examine the situation after the appellate process has run its course. The rule permits the trial judge to evaluate the situation, not as it existed at the time of the trial, but as it exists (some times months and some times years later) at the time when the defendant is about to commence the service of his sentence. The obvious purpose of the rule is to permit the Court in a proper case to modify a sentence or to impose probation. Indeed, the rule should be read together with 18 USCA 3651, *et seq.,* which establishes a probation system in the federal penal structure. Together, the rule and the probation law establish a policy relating to sentencing which trial judges are enjoined to follow.

It has been recognized that in ruling upon motions for probation, trial Courts may not abuse their discretion or act arbitrarily or capriciously. *United States v. White*, 147 F.2d 603 (3 Cir.); *Manning v. United States*, 161 F.2d 827 (5 Cir.); *Kirsch v. United States*, 173 F.2d 653 (8 Cir.); *United States v. Cosentino*, 191 F.2d 574 (7 Cir.); *Dodd v. United States*, 213 F.2d 854 (10 Cir.). In the resolution of an issue such as was presented to Judge Mathes by petitioner's motion, a trial Court is to be guided by a judicial discretion; it is not to be prompted by arbitrary or capricious motives.

> "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria v. Morgan*, 186 U.S. 1, 9, 46 L.ed. 1027, 22 S.Ct. 731. It takes account of the law and the particular circumstances of the case and is directed by reason and conscience of the judge to a just result.' *Langnes v. Green*, 282 U.S. 531, 541, 75 L.ed. 520, 526, 51 S.Ct. 243. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." (*Burns v. United States*, 287 U.S. 216, at 222-223.)

Here, Judge Mathes' failure to exercise such a judicial discretion is indicated by (1) his analogizing this offense to a Smith Act violation at the time of the original sentence and on remand; (2) his insistence that he could not reduce the sentence because of his belief (unsupported by the record) that petitioner

was still a Communist; and (3) his insistence that petitioner declare an adherence to an undefined "system" to which the judge conceives himself to be dedicated. Such criteria are not the stuff of which judicial, as distinguished from executive (see *Bridges v. United States,* 185 F.2d 881, at 887 (9 Cir.)), decisions are made. Judge Mathes may harbor strong feelings against Communists and Communism, but in the imposition of a criminal sentence he is required to act in a judicial capacity under the Constitution and to exclude from his thinking all such extraneous considerations—especially in the case, as this record shows, of a non-Communist.

For the evidence shows that since 1947 petitioner has had no associations with Communists, that he deliberately refrained from such associations, that he has had arguments and disagreements with persons reputed to be Communists, and has in fact had no relations of any kind with them. It shows further that since at least 1954 he has embarked upon an entirely new and different kind of life from that which he followed earlier. It shows not only his love of family and hard work to support them, as the Court below remarked, but it also shows the complete change in his personality (TR 5-22).

Yet despite this uncontroverted evidence, Judge Mathes arbitrarily, capriciously and without any foundation whatsoever, simply stated that he refused to believe it. Judge Mathes did not indicate, as did the judge in *Williams v. New York,* 337 U.S. 241, that there was evidence outside the record which con-

troverted the evidence submitted by petitioner. He simply *arbitrarily refused to believe the uncontradicted and amply corroborated evidence.* More than that, he set up standards such as "renunciation or denunciation of Communism" and "dedication" to a "system" which he apparently required appellant to meet before he would exercise his discretion in favor of appellant. Like the judge in *Vetterli v. United States,* 334 U.S. 852, he took into consideration matters which a judge ought not to consider in the imposition of sentence. Just as the *Vetterli* sentence was reversed because the judge had considered the defendant's invocation of the Fifth Amendment privilege against self-incrimination, so must this sentence be reversed because of Judge Mathes' consideration of matters totally extraneous to the issue before him.

To all of this the Court below merely reiterated its statement that an Appellate Court has no authority or control over a sentence which is within the limits allowed by the statute. It did not even consider, at least its opinion does not mention, *United States v. Daugherty,* 269 U.S. 360; *Townsend v. Burke,* 334 U.S. 736; *Williams v. New York,* 337 U.S. 241; *Vetterli v. United States,* 334 U.S. 852; *Calvaresi v. United States,* 348 U.S. 961; or *Yates v. United States,* 356 U.S. 363.

This issue is sufficiently significant, not only in the context of this case, but with relation to the administration of criminal justice as a whole, to warrant a review by this Court. Within the last year, several Courts of Appeals have been confronted with this

problem. *Roth v. United States*, 255 F.2d 440 (2 Cir.), *cert. den.*, 358 U.S. 819; *Shepard v. United States*, 257 F.2d 293 (6 Cir.); *Campbell v. United States*, 258 F.2d 160 (D.C. Cir.); *Andrews v. United States*, 263 F.2d 608 (2 Cir.) affirming 170 F.Supp. 380 (S.D.N.Y.) and it may be assumed that it will continue to vex the inferior federal Courts until this Court finally disposes of it.

III.

THE COURTS BELOW SHOULD HAVE INCLUDED THE PROBATION OFFICER'S REPORT AND SUPPORTING DATA IN THE RECORD ON APPEAL.

At first, the Court below directed that the report of the Probation Officer be included in the record on appeal. On rehearing, after the Government filed a memorandum arguing substantially that the report was "confidential", it reversed itself. Petitioner submits that the first ruling, at least in this case, where the Government waived the confidential character of the report (if it ever had such a character) by making it available to petitioner, was correct.

Rule 39, F.R.Crim.P. provides that the rules and practices governing the preparation and forms of records on appeal in civil actions shall apply in criminal actions. Rule 75, F.R.C.P. provides that the appellant shall file a designation of "the portions of the record, proceedings and evidence" which he desires to have included in the record on appeal. It seems manifest that a report which a trial judge considers in passing

upon a motion to reduce or modify a sentence is properly part of the record and proceedings which should be included in a record on appeal, whether or not it may be technically admissible in evidence. To suggest to the contrary is to say that an Appellate Court shall review a determination of a trial Court upon a record different from that which was made below.

In *Williams v. New York*, 337 U.S. 241, this Court held that the sentencing Court could consider a report which would not have been admissible in evidence in the trial held to determine guilt or innocence. The implication seems clear that such a report then becomes part of the record and that on appeal from an order denying a motion to modify a sentence, an appellate tribunal must examine it as part of the record upon which the trial Court acted.

Petitioner makes no complaint that Judge Mathes considered the Probation Officer's report and the letters. On the contrary, he urges that the judge abused his discretion in not according them the weight to which they were patently entitled and indeed failed to exercise discretion by not giving them any weight at all. All he seeks is for this Court to have available to it when it determines the validity of this claim, the same material as was submitted to the District Court.

The argument made below that petitioner wishes to rummage through the confidential files of the Probation Officer is untenable. So far as the report is concerned, petitioner has been given a copy of it. So far as the letters are concerned, they were procured by

petitioner at the suggestion of the Probation Officer. It is an anomalous situation when petitioner and his counsel have the "confidential" material but the Government seeks to prevent the Court of Appeals, or this Court, from examining it.

This problem again arose just recently in the Ninth Circuit, but the Court was not called upon to resolve it, for it appeared "plain" that the contents of the report "could have no bearing" upon the sentence imposed. *Pearce v. United States*, 262 F.2d 662, 665 (9 Cir.). However, the Court recognized that

> "Where the trial judge is relying upon that report in reaching a decision as to whether he should impose the minimum, the maximum or some other sentence, upon the prisoner, something may be said in support of the claim of counsel that he should have an opportunity to examine that report for the purpose of meeting possible adverse statements contained therein likely to affect the term of the sentence. But this is not the case." (262 F.2d at 664.)

Clearly, a document which plays so vital a role in the determination of a criminal sentence must of necessity be part of the record which an Appellate Court will review, so that it may exercise its appellate function properly. If matters which determine criminal sentences are kept out of the record, no meaningful appellate review is possible.

CONCLUSION.

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
May 12, 1959.

Respectfully submitted,
RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

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Appendix

PROCEEDINGS ON MOTION.

The Court: These are very difficult matters, a difficult one especially because of the type of person involved. The autobiographical affidavit that the defendant filed explains in rather eloquent case history terms the monstrous economic conditions that existed during the depression years in this country which drove many fine young people into the Communist party. I presided at a trial of fourteen Communists down in Los Angeles, and at the time of sentence I heard each one of them tell his life history somewhat in the same vein as the defendant Bryson, and it was surprising how many of those confessed to Communism, those who were born in this country; how many of them went into the Communist party and embraced the philosophy during those dismal years of 1931, say, to 1934. There used to be an expression which I heard years ago. We used to hear it quite frequently. I do not know the source of it, but something to the effect that if a man, a college trained man at age 20 was not a socialist or not inclined to be a socialist, something was probably wrong with his heart. If at 40 he was still inclined to be a socialist, something was probably wrong with his head.

I wish I could believe Mr. Bryson is no longer a Communist. I wish I could believe he was dedicated as he apparently once was to Communism—I wish I could believe he were dedicated today to defend our system, which I am sworn to uphold.

—I find nowhere in his affidavit any renunciation or denunciation of Communism or Communist doctrine. In short, gentlemen, I cannot bring myself to grant the motion. The motion will be denied, and the defendant will be committed to the custody of the Marshal to serve his sentence. His bail will be exonerated.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUGH BRYSON, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15,881 Apr. 22, 1958

Before HEALY, POPE and HAMLEY, Circuit Judges.

PER CURIAM.

The appellant above named has filed notice of appeal from an order of the district court denying his motion to reduce sentence under Rule 35, Rules of Criminal Procedure. He moves for an order directing that there be included in the record on this appeal the report of the Probation Officer dated January 3, 1958, as submitted to the court below for use on such motion to reduce sentence.

The United States has responded with a motion to dismiss the appeal on the grounds that (1) the order denying modification of sentence is not appealable, or reviewable, and (2), the appeal is frivolous.

The motion to dismiss the appeal is denied. In the light of the decisions in *Stack v. Boyle*, 342 U.S. 1, 6, and *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545-7, we think the order here is a final one, and appealable. Reading *Vetterli v. United States*, 344 U.S. 872, we cannot, at this stage, say that the appeal must be dismissed as frivolous. Cf. *Townsend v. Burke*, 334 U.S. 736, and *Trop v. Dulles*, ___ U.S. ___, (March 31, 1958), and cases cited.

In view of the special circumstances here shown, including the fact that a copy of the report of the Probation Officer (a Supplemental Presentence Report) has been furnished to appellant and hence cannot in any respect be deemed confidential material, it is ordered that the report, including such accompanying documents as were furnished to the sentencing judge as a part thereof, be made a part of the record on this appeal.

(Endorsed:) Per Curiam Opinion. Filed Apr. 22, 1958.
Paul P. O'Brien, Clerk.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUGH BRYSON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,881

ORDER

On Appellant's Motion for Inclusion in Record on Appeal of Probation Officer's Report and Related Material, and Appellee's Motion to Dismiss Appeal

Before: Healy, Pope, and Hamley, Circuit Judges.

The order of April 22, 1958, disposing of the above motions having been withdrawn by order dated May 16, 1958, and the motions having been resubmitted after the filing of additional briefs.

It is now ordered that the motion of appellant for an order directing the United States District Court for the Northern District of California, Southern Division, to include in the record on appeal herein the report of the Probation Officer dated January 3, 1958, and all letters and other communications, documents, reports, or memoranda received by the Probation Officer in connection therewith, be, and it is hereby, denied.

It is further ordered that the motion of appellee to dismiss the appeal be, and it is hereby, denied.

William Healy,
Circuit Judge.
Walter L. Pope,
Circuit Judge.
Frederick G. Hamley,
Circuit Judge.

(Endorsed:) Opinion. Filed June 12, 1958.
Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUGH BRYSON, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15,881 Mar. 30, 1959

Appeal from Order Denying Modification of Sentence

Before: CHAMBERS and HAMLIN, Circuit Judges, and SOLOMON, District Judge.

SOLOMON, District Judge:

This case is now before the court on Bryson's appeal from an order of the District Court denying his motion to reduce sentence under Rule 35 of the Federal Rules of Criminal Procedure.

In essence, he contends

(1) that the sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment of the Constitution of the United States; and

(2) that the trial court applied an unlawful and improper standard in denying such motion.

Hugh Bryson was tried on two counts of an indictment which charged him with having falsely sworn that he was not a member of the Communist Party nor affiliated with such Party, in an affidavit filed with the National Labor Relations Board, in violation of §1001, Title 18, United States Code. The evidence adduced at the trial showed that Bryson, beginning in 1937, was an active and militant member of the Communist Party and of the Marine Cooks and Stewards. He occupied positions of leadership in the

Communist Party and accepted Party discipline. In 1947, he became the national president of his union. In that year, Bryson attended a meeting called by the Trade Union Director of the Communist Party to discuss the Communist Party attitude towards the recently-enacted Taft-Hartley Act. The Director announced that Party members in labor unions should boycott the Act unless rival unions attempted to raid their membership or involve them in jurisdictional disputes in which event they should resign from the Party in name only but remain in close touch and alliance with the Party.

In April, 1951, Bryson and other officers of the union, in order to enable the union to avail itself of the machinery of the National Labor Relations Board to protect its membership from raids by other unions, swore that they were neither members of nor affiliated with the Communist Party.

Bryson was acquitted on the membership count but was found guilty on the affiliation count. He was sentenced to serve a term of five years imprisonment and to pay a $5,000 fine on the affiliation count, the maximum penalty for such offense.

Bryson in his appeal from the judgment of conviction assigned numerous errors, but none of them related to the sentence. A statement of his assignment of errors as well as a fuller statement of the facts is set forth in the opinion of the court which affirmed the judgment of conviction. 238 F.2d 657, petition for rehearing denied 243 F.2d 837, certiorari denied 355 U.S. 817.

After the mandate was filed in the District Court, Bryson timely moved the court for an "order reducing or modifying the sentence heretofore made and entered herein, by suspending the imposition thereof, placing the defendant on probation, and for other and further relief," pursuant to Rule 35.

Accompanying the motion were many letters attesting to Bryson's good character as well as a long affidavit of Bryson's of a biographical character, containing more than 4,000 words.

In it Bryson told of his early life, the various jobs at which he worked, the high regard in which his parents were held by their neighbors and friends, the contributions he and other members of the Merchant Marine made during World War II, his shock and surprise at being indicted for false swearing and his

greater shock at being convicted. He also told of his love of family and his desire to earn a living for them, his work in selling motels, the investors with whom he worked and socialized and whom he found to be human beings like his union members, and his desire for probation and for a peaceful life in his community.

The full and complete statements in Bryson's affidavit relative to his association with Communists,[1] his decision to break with them,[2] his signing the non-communist affidavit,[3] and his arguments with people reputed to be Communists[4] are set forth in the margin.

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[1] "From early '38 I had gone to some Communist meetings. I had met Communists on ships and ashore, and others who were either somewhat sympathetic or who felt things in the Union should be changed. The ones I met didn't seem too interested in 'changing the world', or in trying to even change our form of Government."

[2] "In 1947, however, I decided to quit my association with the Communists. I felt many of them were sincere, but I couldn't see where they were of any particular benefit to the Union, because they were being used by opposition forces to help split the Union. They constantly brought up issues it seemed for the sake of repetition, because the Union was doing all it could to help further the membership's interests and that of working people generally. I did not go to any more meetings after April '47, and deliberately stayed away from associating with people many times called Communists in the Union as well as outside. I was thinking the Union itself had done well and the members were on the way to more security and a better life. I did not discount the work of the several who had given much to help put the Union in this position, but felt there were other places for them where they could do the same type of work in the way of improvements, but that we had become on a part [sic] and in some instances exceeded the other departments on the ships in the gains we had made, and that we could not constantly be fighting for more, because we were only one department and could not lead the industry."

[3] "I told [my attorneys] I had ceased associating in any way with Communists in early '47, and that four years later I felt was ample time to have been disassociated. I hesitated in signing even though my attorneys felt there would be no difficulty because I had reached the stage in life where I felt I had done about all that could be done for the Union, and I had reached the 'top' as far as I was concerned in the labor movement."

[4] "And in the bail hearing I told him I had not been associated with the Communists since early '47, but he still forced me to jail, until the bail could be appealed and reduced, which it was later. As a matter of fact, during the closing days of the Union I headed, I had many

At the conclusion of the hearing, the trial judge denied Bryson's motion to reduce or modify the sentence, and it is from this order that Bryson appealed.

I.

Bryson in this appeal has asserted for the first time that the sentence imposed upon him constitutes cruel and unusual punishment in violation of the Eighth Amendment. He made no such claim at the time sentence was imposed or in his appeal from the judgment of conviction.

The Taft-Hartley Act requires union officers to file affidavits showing that they are free from Communist Party membership, affiliation or beliefs as a condition precedent to the filing by their unions of unfair labor charges or representation cases with the National Labor Relations Board.

Bryson asserts that the crime for which he was convicted "was at most a minimal and technical violation of the law"; that he was convicted of falsely swearing that he was not affiliated with the Communist Party—an offense which he claims is much less serious than false swearing with respect to either the personal advocacy of the violent overthrow of the Government or membership in a proscribed organization. He therefore argues that the imposition of the maximum sentence for the least severe of the three grades of offenses constitutes cruel and unusual punishment.

The vice of Bryson's argument is that Congress did not provide degrees or grades of severity as between false swearing with

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serious arguments with people who had been accused of being Communists and with whom I violently disagreed regarding the course my then Union was taking. In particular, I had what almost amounted to fights with officials of the I.L.W.U. regarding my Union problems. • • • I mention this and these arguments I had with the I.L.W.U. officials simply in support of my statement in court that so far as reputed Communists are concerned, and the I.L.W.U. officials for years were reputed to be Communists, I have really had nothing to do with them, our relations have not been friendly, and outside of asking them for help, which I have not received, I have had nothing to do with them."

respect to affiliation or membership in a proscribed organization or personal advocacy of the violent overthrow of government. Nor did Congress provide different punishments for different types of false swearing.

In *American Communications Association v. Douds*, 339 U.S. 382 (1950), the Court called attention to the mass of evidence submitted to Congress with reference to political strikes and to the likelihood of the disruption of commerce and industry by Communists and others proscribed by the statute who had infiltrated into unions for improper motives. It found ample constitutional justification for the provisions of the Taft-Hartley Act which sought to prevent such evils.

The sentence in this case being within the limits fixed by the statute should not be disturbed on the claim here asserted that it is cruel and unusual. *Jackson v. United States*, 9 Cir. 1900, 102 Fed. 473; *Cochran v. United States*, 8 Cir. 1930, 41 F.2d 193.

II.

The Court prefaced the denial of Bryson's motion for a reduction of sentence with a short statement concerning "the monstrous economic conditions that existed during the depression years in this country which drove many fine young people into the Communist Party," and concluded, "I wish I could believe Mr. Bryson is no longer a Communist. I wish I could believe he was dedicated as he apparently once was to Communism—I wish I could believe he were dedicated today to defend our system which I am sworn to uphold. I find nowhere in his affidavit any renunciation or denunciation of Communism or Communist doctrine."

Bryson contends that these statements show that the Court in determining the motion used an improper standard in that he was required to "declare an adherence to an undefined 'system' to which the Judge conceives himself to be dedicated." Bryson further contends that he did renounce and denounce Communism in his affidavit and that the Court was required to believe him, by reason of the fact that the Government did not file a counter affidavit. Because of the use of such standard and the failure to

believe him, Bryson asserts the Court was guilty of an arbitrary abuse of discretion.

The jury found Bryson guilty of having falsely sworn that he was not associated with the Communist Party on an instruction from the Court which permitted the jury to find Bryson guilty only if it found that he was a Communist "in every sense but that of the mere technicality of being a member—in everything but name."

The Communist Party is not an ordinary political party. It is a conspiratorial organization dedicated to the overthrow of the Government of the United States by force. *United States v. Dennis*, 2 Cir. 1950, 183 F.2d 201, 212, aff'd. 341 U.S. 494.

In view of the nature of the crime, it was particularly appropriate for the Court to consider Bryson's attitude toward the Constitution and laws of the United States in determining whether he merited, as a matter of grace and not of right, a reduction of his sentence.

Bryson's trial was a long one. Many witnesses testified about his activities in and his associations with the Communist Party. Although Bryson did not testify at the trial, after he was convicted, he testified in connection with his application for bail.

Bryson, in support of his present motion, filed an affidavit in which he swore that he "had not been associated with the Communists since early '47." The jury found that he was so associated in April, 1951.

In view of these circumstances, the Court was not required to believe Bryson's statements with reference to Communism even though his affidavit was not contradicted. *Quock Ting v. United States*, 140 U.S. 417, 420; *Zimmer v. Acheson*, 10 Cir. 1951, 191 F.2d 209, 212; *N.L.R.B. v. Howell Chevrolet Co.*, 9 Cir. 1953, 204 F.2d 79, 86, aff'd. sub. nom. *Howell Chevrolet Co. v. N.L.R.B.*, 346 U.S. 482.

We find no substance in Bryson's contentions, even when considered on their merits. In addition, we believe that this appeal must be dismissed.

In his motion under Rule 35, Bryson requested the trial court to reduce and modify his sentence by placing him on probation

or by granting him other relief. In the original appeal, Bryson did not claim that the court erred in not placing him on probation, and no such claim would have been effective because once a defendant is convicted, he is in no position to demand probation. Probation is granted to a defendant as a privilege and not as a right. *Burns v. United States*, 287 U.S. 216, 220. An appeal will not lie from its denial. *Elder v. United States*, 9 Cir. 1944, 142 F.2d 199, 201.

In *Brown v. United States*, 9 Cir. 1955, 222 F.2d 293, the defendant was convicted of four counts of an indictment charging him with the sale and transportation of heroin which had been unlawfully imported into the United States. Consecutive sentences of 10 years and a $2,000 fine were imposed on each of the four counts. In a prior conviction on the same indictment, which had been reversed on appeal, the defendant had been convicted of five counts and received concurrent sentences of five years and fines totalling $1250. In other words, on the second trial defendant received sentences totalling 40 years as against 5 years on his first trial. In addition, the fines were increased from $1250 to $8,000. In the appeal, appellant called attention to the severity of the sentences and urged the court to reduce them. In disposing of this contention, the court referred to the case of *Gurera v. United States*, 8 Cir. 1930, 40 F.2d 338, and quoted the following excerpt:

> "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute."[5]

It is equally true that an appellate court has no authority either to reduce or modify a sentence or order the trial judge to do it on an appeal from a denial of a motion under Rule 35. *Flores v. United States*, 9 Cir. 1956, 238 F.2d 758; *Biren v. United States*, 9 Cir. 1953, 202 F.2d 440; *Kimbaugh v. United States*, 5 Cir. 1952, 199 F.2d 453.

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[5]The same language was quoted in **United States v. Rosenberg**, 2 Cir. 1952, 195 F.2d 583. There the court upheld sentences of death imposed upon the appellants for having violated the Espionage Act.

Bryson's appeal from the trial court's denial of his motion to reduce or modify sentence under Rule 35, Federal Rules of Criminal Procedure, is dismissed.

(Endorsed:) Opinion. Filed Mar. 30, 1959.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

HUGH BRYSON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 15,881

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is dismissed.

(Endorsed:) Judgment

Filed and entered: March 30, 1959,
Paul P. O'Brien, Clerk.

United States District Court
Northern District of California
Southern Division

Supplemental Presentence Report

No. 34105

Name—Hugh Bryson
Address—2360 Bunker Hill Drive
San Mateo, California
Age—43
Sex—Male
Race—White
Citizenship—USA
Marital Status—Married
Number of Dependents—7
Offense—Violation of Title 18, USC, Section 1001—
False Statement to a Government Agency
Penalty—5 years and/or $10,000

Honorable William C. Mathes
United States District Judge
San Francisco, California

Sir:

Reference is made to the case of the above named defendant who, under date of May 25, 1955, was adjudged guilty of Count 2 of the Indictment after trial by jury. The specific charge was providing a false statement to an agency of the United States. He was represented by George Andersen and Richard Gladstein, retained.

Under date of June 14, 1955, Mr. Bryson was sentenced to five years imprisonment and a $10,000 committed fine was assessed by your Honor. Thereupon

oral notice was given of appeal and appeal was carried ultimately to the Supreme Court of the United States where it was denied. Notice of denial of appeal was received by the Clerk, United States District Court, San Francisco, on November 22, 1957.

On November 26, 1957, a motion to modify judgment was made before the Honorable George B. Harris, United States District Judge, who at that time granted a stay of execution and continued the matter generally for hearing on the motion to modify. The Honorable Harris also directed that a Supplemental Report of the Probation Officer be made. The matter now appears on the calendar on January 3, 1958 for hearing on the motion to modify.

Since a complete pre-sentence report was filed with your Honor prior to June 14, 1955, this report will cover only the ensuing period. Since the granting of probation Mr. Bryson has continued in the real estate business, specializing in the sale of motels throughout California. His sales activities have ranged from Santa Barbara in the south to the Oregon line. He has been reasonably successful in this endeavor, advises that he has netted from $500 to $1000 per month from this occupation. Mr. Bryson does not possess a real estate or business opportunities broker's license but has worked under the license of other brokers; necessarily having had to turn over a large portion of his earnings to the brokers in accordance with the custom of that business. He first worked with Edith Becker at 1424 Lombard Street and then was associated with Leon Roth until September 1956.

Since that time he has operated from 1842 Van Ness at Washington under the license of B. P. Martynow and in this last arrangement he has given Mr. Martynow forty percent of his sales commissions, previously having turned over fifty percent.

Mr. Bryson applied for a business opportunities broker's license through the Real Estate Commissioner of California. This application, however, because of instant conviction, was never acted upon, the license having neither been granted nor denied. The Division of Real Estate advises your Probation Officer that Mr. Bryson has been a reputable member of the profession and no complaints of any type have been received concerning business practices. He has on occasion been subpoenaed as a witness for the Commission against other salesmen. With the arrival of the notice of denial of appeal on November 22, 1957, the California Real Estate Commission has filed charges to revoke the business opportunities salesman's license which Mr. Bryson now possesses. This license was granted prior to his conviction in this Court and the new action is based solely on the conviction of a felony which occurred in this case. As previously indicated, there is no complaint with regard to his business practices. This matter has not as yet been set for hearing. In November following the notice of denial of appeal Mr. Bryson closed his office at 1842 Van Ness, now operates out of his home but does maintain an answering service at 1010 Franklin Street, this city.

With reference to his personal situation, in July 1955 Mr. Bryson secured custody of his two children

born to his first wife whom he had previously been supporting under Court order. They now reside with subject and his current wife. In the house also are the three children from his present union, two additional children having been born to his present wife since judgment was entered in this case. A daughter of his wife by a previous marriage also resides with the Brysons and he has been responsible for the support of all the children. On November 1, 1957, Bryson and his family moved to a new tract home at 2360 Bunker Hill Road, San Mateo, California. This home is in the wife's name and was purchased in part from proceeds from the sale of the apartment house which Mrs. Bryson owned at the time of his Court appearance in 1955. It is a new, four bedroom home on a view lot in a new subdivision of the San Mateo hills. The purchase price was $26,000, $12,000 having been paid down and the balance being paid at $126.50 per month. According to Mr. Bryson, with the sale of the apartment house his wife now is without income. The move to the suburbs was motivated by an accident some ten weeks ago to the oldest daughter in front of the apartment house where the Bryson family resided. Mrs. Bryson desired to get the children away from the congested traffic of San Francisco's Broadway. The children and their ages are: Enrique, born December 2, 1948; Ricardo, born August 13, 1950; Loretta Ann (Mrs. Bryson's child), born February 4, 1951; Evon, born April 28, 1954; Gina, now sixteen months of age; and Hugh, Jr., born June 25, 1957.

Your Probation Officer in his investigation has been unable to uncover any recent indication of affiliation or association with Communist activities and your Honor's attention is invited to the sworn statement of Hugh Bryson which is attached hereto, in which he denies any recent activities of this type.

Respectfully submitted,

Albert Wahl,
Chief U. S. Probation Officer.

Dated: January 3, 1958
San Francisco, California.

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Office Supreme Court, U.S.
FILED
JUN 9 1958
JAMES R. BROWNING, Clerk

No. 929

In the Supreme Court of the United States

OCTOBER TERM, 1958

HUGH BRYSON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 929

HUGH BRYSON, PETITIONER

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1955, petitioner was convicted of having falsely sworn, in an affidavit filed with the National Labor Relations Board, that he was not affiliated with the Communist Party. He was thereupon sentenced to five years' imprisonment and a fine of $10,000. After full appellate proceedings, the judgment of the District Court was affirmed. 238 F. 2d 657, rehearing denied, 240 F. 2d 837, certiorari denied, 355 U. S. 817. Throughout these appellate proceedings, no challenge was made to the legality of the sentence (which, concededly, does not exceed the statutory limits).

After completion of these appellate proceedings, petitioner moved in the District Court, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for an order reducing or modifying the sentence. The instant appeal was taken from a denial of this motion.

We believe that the Court of Appeals was plainly correct in concluding (Pet. App. v-xii) that the appeal (which was ordered dismissed) was without substance, and we believe it apparent that this case presents no issue warranting review by this Court.

The principal contention advanced—a contention first made in the Court of Appeals following the denial of the motion to reduce sentence—is that the original five-year sentence falls under the constitutional ban of "cruel and unusual punishment." The short answer is that the sentence is within the statutory limits and that obviously the congressional authorization of a five-year term of imprisonment for false swearing involves no departure from traditional penalties. Undoubtedly the trial judge might have chosen to impose a lesser penalty. That, however, is not a matter for the appellate courts which, for generations, have "unswervingly denied themselves power to revise sentences on appeal," *United States* v. *Rosenberg*, 195 F. 2d 583, 604, note 25 (C. A. 2), certiorari denied, 344 U. S. 838. And see *Gurera* v. *United States*, 40 F. 2d 338, 340-341 (C. A. 8).

Petitioner also argues that the District Judge was arbitrary and capricious because he expressed himself, in the latest proceedings, as unable to believe that petitioner was dedicated to the Constitution and

laws of the United States. In this connection, it is contended that an "uncontroverted" affidavit filed by petitioner showed that there had been a complete change in his outlook (Pet. 26). We note in passing that the "uncontroverted" affidavit alleges that petitioner has had no Communist affiliations since 1947, whereas the jury necessarily found in the main case that petitioner was affiliated with the Party in 1951. There is a more basic answer—that it is the function of the District Judge (a judge who, in this instance, had presided at the trial) to evaluate the character and attitudes of the defendant for purposes of determining what sentence he should impose. His judgment in this area is not reviewable if the sentence imposed is within the permissible statutory limits.

Petitioner also urges that it was error to fail to include in the record on appeal a probation officer's supplemental report and attached data. That information, however, was for the use of the District Judge. Its function was to aid him in reaching a decision as to whether he should exercise his discretion in favor of reducing the lawful sentence previously imposed. Since that determination was one for his discretion alone, and since the appellate courts do not sit to revise the determinations of district judges in such matters, there was no occasion, we submit, to include the material in question in the appellate record.*

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* There is no claim that the probation officer's report (which petitioner has printed, Pet. App. xiii-xvii) contains any improper or prejudicial matter. On the contrary, the argument is that the report was favorable to petitioner and was not accorded sufficient weight. Pet. 29.

CONCLUSION

The appeal in this case raised no substantial issue within the province of the appellate courts, and it was properly ordered dismissed by the court below. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JUNE 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 509385 1571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. 929

[illegible] BENSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

REPLY MEMORANDUM ON BEHALF OF PETITIONER.

[illegible]

GEORGE R. ANDERSON,

[illegible]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 929

HUGH BRYSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

REPLY MEMORANDUM ON BEHALF OF PETITIONER.

The Government's cavalier treatment of the Petition for Certiorari is unworthy of the serious questions presented.

1. We pointed out (Petition 27-28) that the question relating to limits upon the exercise of discretion in the imposition of criminal sentences is one which has been faced by at least three other Courts of Appeals within the past year. *Roth v. United States*, 255 F.2d 440; *Shepard v. United States*, 257 F.2d 293; *Campbell v. United States*, 258 F.2d 160; *Andrews v. United States*, 263 F.2d 608. From its Memorandum

in Opposition it would appear that the Government is not even aware of the existence of these cases. It certainly does not suggest that the question is not an important one.

2. We pointed out (Petition 19-20) that in at least five criminal cases, exclusive of contempt proceedings, this Court has reviewed and reversed sentences concededly within statutory limits. *United States v. Daugherty,* 269 U.S. 360; *Townsend v. Burke,* 334 U.S. 76; *Keenan v. Burke,* 342 U.S. 881; *Vetterli v. United States,* 344 U.S. 852; *Calvaresi v. United States,* 348 U.S. 961. The Government does not discuss or consider these cases, nor address itself to the questions raised by them. It simply repeats, as if by rote, the proposition that a sentence is not reviewable if it is within the permissible statutory limits. But each of the cases cited is an explicit holding to the contrary.

3. We pointed out (Petition 24-28) that the trial judge was guilty of an arbitrary and capricious refusal to exercise judicial discretion. To this the Government makes the same routine response. But that response is clearly inadequate, for even when a judge is granted a discretionary power, he may not abuse it by arbitrary and capricious action. The Government does not attempt to justify the sentence here. Indeed, it concedes that a lesser penalty might have been imposed. (Memo. p. 2.) It simply says that no matter how indefensible was the action of the trial Court, this Court can do nothing about it.

We think the cases we rely on, plus this Court's general supervisory power over inferior federal

tribunals (*Cf. McNabb v. United States*, 318 U.S. 332; *Grunewald v. United States*, 353 U.S. 391) establish the contrary. In any case, we think our petition merits a more considered response than the Government has made.

We urge that the writ be granted and the case reviewed by this Court.

Dated, San Francisco, California,
June 12, 1959.

Respectfully submitted,
RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
Attorneys for Petitioner.